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No. 497

# In the Supreme Court of the United States

October Term, 1942

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 497

WILLIAM MALAT, ET AL., PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Taxpayers,[1] a husband and wife, received a notice of deficiency from the Commissioner which set forth the amount of the deficiency and in an attached schedule explained the basis for the Commissioner's adjustments to the reported net income. The schedule advised the taxpayers (Pet. App. 25–26):

"Taxable Year Ended December 31, 1950"
"Schedule 1"
"Adjustments to Net Income"

[1] The decisions below determined four separate cases which had been consolidated for hearing. The contentions in each case are similar and, in the interest of simplicity, we will discuss them here on the basis of representative facts from one of the cases.



665236—62

| | |
|---|---|
| Net income as disclosed by the return | $33,339.47 |
| Additional income: | |
| (a) Ordinary income | 51,866.69 |

* * * * *

Schedule 2
Explanation of Adjustments

| | |
|---|---|
| (a) Pioneer Plaza, Inc. | 32,962.83(1) |

* * * * *

(1) The net profit of $30,045.48 returned by you as a long-term capital gain from the sale of 31 lots, Pioneer Plaza, has been increased to a net profit of $32,962.83 from the sale of 31 homes. The homes are part of a single subdivision tract financed and constructed by Pioneer Plaza, Inc. The corrected net profit was received and retained by you under a claim of right and without restrictions as to its disposition.

It is held the sales were those of Pioneer Plaza, Inc., and the net profits are taxable first to it and then, as corporate distribution to you as a stockholder of Pioneer Plaza, Inc., as ordinary income under section 22(a) of the 1939 Internal Revenue Code.

In the alternative it is held that the homes were not capital assets but were held primarily for sale to customers in the ordinary course of your trade or business. The net profit from the sale is taxable as ordinary income under the provisions of section 22(a) of the Internal Revenue Code of 1939. The capital gain of $15,022.74 (50 percent of $30,045.48) has been eliminated from your income."

Upon receipt of this notice, the taxpayers filed a petition in the Tax Court which alleged that the deficiency was in error (Pet. App. 26).

Prior to the time for hearing, the taxpayers filed a motion for "judgment on the pleadings" (Pet. App. 4–5, 28) which moved the Tax Court to enter judgment in favor of the Commissioner for the full amount of the deficiency asserted and upon one of the two alternative grounds set forth in the Notice of Deficiency. The motion provided (Pet. App. 4):

MOTION

> Petitioners move the court for judgment on the pleadings, with the resulting deficiency to be determined under Rule 50, and for that purpose show as follows:
>
> * * * the Commissioner in his deficiency notice, * * *, has held by way of an "alternative" finding that the real estate parcels involved "were not capital assets but were held primarily for sale to customers in the ordinary course of your [petitioners'] trade or business."
>
> Petitioners now ask the court to adopt the said holding of the Commissioner as its finding of fact under these issues.
>
> Petitioners submit for this purpose that they are under no obligation to support by evidence a position taken by the Commissioner in his deficiency notice. * * *

Taxpayers advised the court that they would offer no testimony or evidence and that they would rest upon the motion for judgment on the pleadings (Pet. App. 5, 27).

The Tax Court denied the motion on the ground that it was meaningless because the taxpayers, who had the burden of proof, submitted their case without offering any evidence. It ordered judgment for the Commissioner on the ground that his determinations were presumptively correct and that the taxpayers had failed to sustain their burden of proving that they were not (Pet. App. 5–6, 28–29). The court of appeals affirmed, one judge dissenting (Pet. App. 1–14; 14–18), and denied a petition for a rehearing (Pet. App. 23).[2]

The main question presented by the petitioners is whether the decisions of the courts below should be set aside because the Tax Court did not enter findings of fact to support its deficiency order. The order was entered following a motion by petitioners for judgment in favor of the Commissioner in the exact amount claimed by him. Under these circumstances, the court below quite properly held that there was no need for any findings of fact (Pet. App. 10):

> When the petitioners concede that the tax determined by the Commissioner is owed, as they did in this case, then the fact-finding and law-

[2] On petition for review by the Ninth Circuit, taxpayers had designated as part of the record the records in 15 other cases then pending in the Tax Court which involved taxpayers' liability as transferees of the assets of their real estate corporations (R. 20–21). When these documents were excluded on motion of the Commissioner (R. 23–24), the taxpayers filed a motion in the court of appeals to require the Tax Court to include them in the record (R. 30–34). After a separate hearing on this motion, the court of appeals reserved judgment and then denied the motion at the time of the ruling on the merits (Pet. App. 14, 19–22).

> expounding function of the Tax Court is at an end, and nothing remains to be done except to enter an order determining the amount of the deficiency. That is precisely what the Tax Court did here.

This is also a complete answer to petitioners' contention here that, because of the alternative explanations offered for the deficiency, the burden of proof shifted to the Commissioner and was not sustained by him.[3]

This holding was clearly correct. There is no conflict of decisions. Petitioners cite no case holding that the Commissioner must introduce factual proof or that the Tax Court must make findings of fact in support of a deficiency order where the taxpayers introduce no evidence and move for judgment against themselves in the amount claimed by the Commissioner.[4]

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[3] With reference to the taxpayers' interest in other cases pending before the Tax Court in which they were contesting deficiencies asserted against their real estate corporations, the court of appeals stated (Pet. App. 11):

> * * * what the taxpayers here have tried to do is to execute a maneuver whereby they hoped, without presenting any evidence on the subject, to obtain a binding adjudication that the sales were by them and not by the respective corporations, thereby killing off the other pending cases. The Tax Court refused to lend itself to this little game, and we think that what it did was proper.

[4] As the court below said in its opinion (Pet. App. 12) such cases as *Helvering* v. *Taylor*, 293 U.S. 507; *Helvering* v. *Tex-Penn Company*, 300 U.S. 481; *Harbor Plywood Corporation* v. *Commissioner*, 143 F. 2d 780 (C.A. 9); *Timmons* v. *Commissioner*, 198 F. 2d 142 (C.A. 4); *Estate of MacCrowe* v. *Commissioner*, 252 F. 2d 293 (C.A. 4); and *Welch* v. *Commissioner*, 297 F. 2d 309 (C.A. 4), can have no application here. In most of those cases evidence was received, and the Tax Court was properly required to make appropriate findings; in

There is no merit to petitioner's further contention that the court of appeals erred in failing to order the inclusion in the record of the files and records in other cases involving petitioners then pending before the Tax Court. Had petitioners wished to show from these records that "duplicating and excessive taxes have been imposed" (Pet. 19), they were free to offer such proof in the Tax Court. Their failure to do so did not require the court of appeals to certify as part of the record facts which were not before the Tax Court.

The petition for certiorari should be denied.

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NOVEMBER 1962.

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effect, they deal with a shifting of the burden of proof when the taxpayer presents evidence. In *Harbor Plywood*, the Commissioner was held bound by his own determination of the value of certain depreciable assets; there was no such admission by the taxpayer as is here involved. In *Tex-Penn Co.*, the Board had made findings and the court disagreed only with its legal conclusions. In *Welch*, the Commissioner's determination was erroneous on its face.

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